PETITION FOR MANDAMUS.

SUPREME COURT OF THE UNITED STATES

No. 5.—ORIGINAL.

EX PARTE IN THE MATTER OF BENJAMIN H. ZELLNER, PETITIONER.

PETITION FOR MANDAMUS TO THE JUDGES OF THE COURT OF CLAIMS.

FILED APRIL 9, 1869.

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1 To the judges of the Supreme Court of the United States:

The petition of Benjamin H. Zellner respectfully showeth—

That heretofore, to wit, on the 21st day of February, 1866, thirty bales of cotton, the property of your petitioner, were seized in the name of the United States, and sold on account of the treasury; that your petitioner has filed a petition in the Court of Claims for the recovery of the proceeds of the sale of said lot of cotton, in accordance with the provisions of the statute in that case made and provided.

That afterwards, to wit, on the 22d of March, 1869, the Court of Claims rendered a judgment in said cause, finding for the defendant, and dismissing the claimant's petition.

That thereupon, to wit, on the 29 of March, 1869, the petitioner filed in the Court of Claims his prayer for allowance of an appeal to the Supreme Court of the United States.

That on the 5th of April, 1869, the Court of Claims passed an order refusing to allow said appeal.

And petitioner is advised that he is entitled to an appeal to this honorable court from the said judgment of the Court of Claims, in accordance with the provisions of an act to amend "An act to estab-

2 lish a court for the investigation of claims against the United States," approved March, 1863.

Wherefore, inasmuch as the said Court of Claims has refused to allow said appeal, and as the petitioner has no other adequate remedy in the premises, your petitioner prays that the writ of mandamus may be issued and directed to the judges of the Court of Claims, commanding and enjoining them to allow said appeal from the judgment of said cause of Benjamin H. Zellner vs. United States. And, as in duty bound, your petitioner will ever pray

For petitioner,

A. G. RIDDLE.

CITY OF WASHINGTON, *District of Columbia*:

Albert G. Riddle, being duly sworn, saith that the several matters and things in the foregoing petition stated are true in substance and in matter of fact, to the best of his knowledge, information, and belief, this 8th day of April, 1869.

R. J. MEIGS, *Clerk*.

3 (Indorsed:) Ex parte Zelner, petition for mandamus. A. G. Riddle for pet'r.

(Indorsed:) Supreme Court U. S. 1868, Dec. term. Original action. No. 5, orig. Ex parte Benjamin H. Zellner, petitioner. Petition for a writ of mandamus to the judges of the Court of Claims.

Filed 9th April, 1869.

4 *Transcript.—Petition.*

In U. S. Court of Claims.—December term, 1867.

BENJAMIN H. ZELLNER }
vs.
THE UNITED STATES. }

To the honorable Court of Claims:

The petition of Benjamin H. Zellner, of the county of Monroe, State of Georgia, respectfully represents to this honorable court—

That your petitioner is a citizen of the United States; that he is and

ever has been loyal to the United States; and that he has at no time voluntarily aided, abetted, or given encouragement to the rebellion against the national government.

Your petitioner also states that in the months of September and October, 1865, a lot of unginned cotton, the produce of his plantation, was ginned and put in bales on his place, and afterwards, during the months of November and December, the same was hauled to the city of Macon, amounting in all to forty-two (42) bales.

That part of said lot, to wit, twelve bales, was sold as the share of his plantation hands, and, after paying expenses, the proceeds were divided among them, and his remaining thirty (30) bales the petitioner had stored at the warehouse of Harris & Ross, commission merchants at Macon, Georgia. This said thirty (30) bales were marked and weighed, respectively, as follows:

Marked B. H. Z.

Number.	Weights.
15	476 lbs.
16	485
17	438
Number.	Weights.
18	450
19	448
20	424
21	488
22	411
23	423
24	397
25	496
26	474
27	417
28	455
29	425
30	480
31	480
32	430
33	414
34	408
35	436
36	494
37	436
38	461
39	429
40	431
41	459
42	465
43	429
44	418
30 bales,	13,377 pounds.

The petitioner further states that on or about the 21st of February, 1866, Clifton T. Wharton, assistant special agent Treasury Department, illegally seized and carried away said thirty (30) bales of cotton, the property of your petitioner.

And the petitioner is informed and believes, and so states, that said

thirty bales of cotton were shipped on or about the 23d of February, 1866, to the supervising agent of the Treasury Department, H. M. Buckley, at Nashville, Tenn., and by him shipped, on account of the United States, to Simeon Draper, at New York; and your petitioner is further informed that the net proceeds of the sale of said cotton, after
6 deducting all charges and expenses, averaged 23 cents per pound, amounting for the said 13,377 pounds to $3,076 71, and he asks the judgment of your honorable court for the said amount, in accordance with the third section of the act of Congress approved March 12, 1863.

And your petitioner avers that he is the sole owner of this claim.

BENJAMIN H. ZELLNER.

RIDDLE, LESRI & WILLIAMS, *Solicitors.*

I hereby declare on oath that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, and that I am justly entitled to the amount therein claimed from the United States, and that the facts stated in said petition are true.

BENJAMIN H. ZELLNER.

Sworn to and subscribed before me this April 23d, 1868.

WM. H. DEWEES, *J. P.*

7

At a Court of Claims held at the Capitol, in the city of Washington, on Monday, the 5th day of April, 1869.

BENJAMIN H. ZELLNER
vs.
THE UNITED STATES. } No. 3273.

And now, to wit, March 22d, 1869, the court, on due consideration of the premises, do find for the defendants, and do order, adjudge, and decree that the claimant take nothing by his said suit, and that his petition be dismissed.

By the court.

8 BENJAMIN H. ZELLNER
vs.
THE UNITED STATES. } 3273.

To the honorables the judges of the Court of Claims:

And now comes the said Benjamin H. Zellner, by his counsel, and prays that an appeal may be allowed him to the Supreme Court from the decree of this court in said cause, in pursuance of the 5th section of the act to amend "An act to establish a court for the investigation of claims against the United States," approved March 3d, 1863, allowing appeals where the amount claimed exceeds three thousand dollars; and also of the provision of "An act to provide for appeals from the Court of Claims, and for other purposes," approved June 25th, 1865.

And the complainant alleges the following as the reason for praying said appeal, to wit:

For that the decree of the Court of Claims dismissing the said complainant's suit, on the ground that the complainant's loyalty is not sufficiently established to entitle him to a judgment against the United States, was erroneous, and ought to be reversed, because the evidence in
9 the case goes to show that the complainant has never given any

aid or comfort to the rebellion, or against the United States, and has consistenty adhered to the United States.

A. G. RIDDLE,
Att'y for Claimant.

10 At a Court of Claims held at the Capitol, in the city of Washington, on Monday, March 29th, 1869.

BENJAMIN H. ZELLNER
vs.
THE UNITED STATES. } No. 3273.

Mr. A. G. Riddle, counsel for the claimant, filed an application for the allowance of an appeal in this case to the Supreme Court of the United States.

At a Court of Claims held at the Capitol, in the city of Washington, on Monday, the 5th of April, 1869.

BENJAMIN H. ZELLNER
vs.
THE UNITED STATES. } No. 3273.

The application for the allowance of an appeal in this case, filed by the counsel for the claimant on the 29th of March, was denied.

11 In the Court of Claims.

BENJAMIN H. ZELLNER
vs.
THE UNITED STATES. } No. 3273.

I, Samuel H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the petition filed in said court in the above-entitled cause, & of the final judgment thereon by said court, and of the application of the claimant for the allowance of an appeal from said judgment to the Supreme Court of the United States, and of the filing of the same in said court, and the judgment of the court denying the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 7th day of April, A. D. 1869.

[SEAL.] SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

12 (Indorsed:) Supreme Court U. S. 1868, Dec. term. Original action. No. 5. Ex parte Benjamin H. Zellner, petitioner. Certified copy of transcript.
Filed 9th April, 1869.

13 *Rule to show cause.—Order of court.*

16, ORIGINAL.—EX PARTE BENJAMIN H. ZELLNER, PETITIONER.

Petition for mandamus to the Court of Claims.

On motion of Mr. A. G. Riddle, of counsel for the petitioner, it is now here ordered by the court that a rule issue in this cause to the judges of

the Court of Claims requiring them to show cause, on the first Monday of December next, why a writ of mandamus should not issue agreeably to the prayer of the petitioner.

25 November, 1869.

14 Supreme Court of the United States.—December term, 1869.
No. 5, original.

In the matter of Benjamin H. Zellner, praying for a writ of mandamus, &c.

To the Supreme Court of the United States:

In response to an order to show cause granted in this matter on the 25th day of November, 1869, the judges of the Court of Claims of the United States respectfully show—

That on the 22d day of May, 1868, the said Benjamin H. Zellner filed his petition in said Court of Claims under the third section of the act of Congress entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary
15 districts within the United States," approved March 12th, 1863, a copy of which petition is annexed to the petition of the said Benjamin H. Zellner, for writ of mandamus in the above-entitled matter.

That the said petition was duly traversed by the defendants therein named; that proofs were taken by the respective parties upon the same; and that the cause was heard on the pleadings and proofs, and on the 22d day of March, 1869, judgment was rendered in said court dismissing the claimant's petition on the ground that the allegations of the said petition were not sustained by the proofs.

That on the 29th day of March, 1869, the said claimant, by his counsel, presented to the said court his application for an allowance of appeal from the said judgment, which application was thereupon denied
16 by the said court on the ground that by law no right of appeal was given to the claimant in such case.

All which is respectfully submitted:

JOS. CASEY,
Ch. J. Court of Claims.
EDW. G. LORING,
E. PECK,
CHARLES C. NOTT,
SAM. MILLIGAN,
Judges, &c.

January 31, 1870.

(Indorsed:) Supreme Court U. S. 1869, Dec. term. Original action. No. 5. Ex parte in the matter of Benjamin H. Zellner, petitioner. Return to rule.

Filed 4 February, 1870.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

IN THE MATTER OF BENJAMIN H. ZELLNER,
No. 5, Original.

IN THE MATTER OF JOHN F. PARGOUD,
No. 8, Original.

Orders on the Judges of the Court of Claims to show cause why writs of *mandamus* should not issue to compel them to allow appeals to this court and make returns thereto.

BRIEF FOR THE UNITED STATES, AND FOR THE JUDGES OF THE COURT OF CLAIMS, ON SHOWING CAUSE.

The petitioners, respectively, brought their actions in the Court of Claims under the third section of the abandoned and captured property act of 12th March, 1863, (12th St. at L., 820,) for the recovery of the proceeds of certain abandoned and captured property paid into the Treasury under that act.

Pargoud's case was dismissed by the court, on motion, for insufficiency of the petition.

Zellner's case was tried on the merits, and judgment rendered against the claimant dismissing his petition.

In each case, the claimant applied to the Court of Claims for the allowance of an appeal, under Rule 2, of this court, in reference to appeals from the Court of Claims. The

applications were respectively denied, on the ground that by law no right of appeal is given to the claimant in such case.

The claimants, respectively, now apply to this court to compel such allowance of appeal, and transmission of the record in pursuance of the same, by *mandamus*. Copies of the opinion of the Court of Claims on denying the application, and of the dissenting opinion of Judge Nott, in the case of Pargoud, are handed up with this brief.

POINTS.

I.

The third section of the abandoned and captured property act submits the cases arising under it to the Court of Claims, to be decided "on proof to the satisfaction of said court." This language imports an exclusive and final jurisdiction, from which there is no appeal.

This proposition, and the authorities sustaining it, are fully discussed in the opinion (delivered by Judge Loring) of the Court of Claims in the case of Pargoud, and no further elaboration of the same is deemed necessary here.

II.

The act of 24th February, 1855, (10th St. at L., 612,) amended by the act of 3d March, 1863, (12th St. at L., 765,) establishes and limits the *general* jurisdiction of the Court of Claims. The latter act (Sec. 5) provides, that "either party may appeal to this court from any final judgment or decree which may hereafter be rendered in any case by said court, wherein" &c.

The act of 12th March, 1863, contains no provision for such appeals. It is submitted, that the general provision of the general act does not cover the jurisdiction given by the subsequent special act.

The counsel for the petitioner styles these acts contemporaneous. Such is not the case. Each act took effect from its approval only.

On the 3d March, 1863, when the amendatory act on the general jurisdiction of the Court of Claims took effect, the court had no jurisdiction of the abandoned and captured property cases. That jurisdiction accrued only by the act which was approved 12th March, 1863. Indeed, it may be doubted whether the latter act, approved nine days after the termination of the Congress which enacted it, would be valid for any purpose, except by its subsequent recognition by the acts of 2d July, 1864, (13th St. at L., 375,) and of 27th July, 1868, (15th St. at L., 243.)

The act of 12th March, 1863, is not a mere enlargement of the powers of the court, by giving a new remedy, but confers a *new jurisdiction* of a subject-matter entirely distinct from from any of which they had jurisdiction under the general laws. In such a case, it is settled that "the remedy cannot be extended beyond the provisions of the act," and the act providing for no appeal from the court charged with this new jurisdiction, no appeal can be had. (United States *vs.* Nourse, 6 Peters, 470, 493 to 497.)

The case cited seems to be in all respects parallel to the cases sought to be appealed from the Court of Claims, so far as the question of the right of appeal is concerned.

The general proposition that, where Congress "has said in what cases a writ of error or appeal shall lie, an exception of all other cases is implied," and that this court is as much bound by an implied as by an express exception, (U. S. *vs* More, 3 Cranch, 170, 173,) is too well settled to need discussion.

III.

The legislative construction of the abandoned and captured

property act, in regard to the right of appeal and the intent of Congress in relation to the same, are shown by the act of 25th June, 1868. (15 St. at L., 75, Sec. 1.) This act was only operative to enlarge the power of appeal by the United States from final judgments of the Court of Claims rendered by virtue of "special power or jurisdiction;" that is to say, new or special jurisdiction conferred by a special act, as distinguished from the general acts of 24th February, 1855, and 3d March, 1863. Under those general acts the power of appeal by the United States already existed, subject to certain limitations as to amount, character, &c., specified in the act of 3d March, 1863. The effect of this section of the act of 25th June, 1868, is to give to the United States the same power of appeal in the acts conferring new and special jurisdiction as already existed under the general acts, and under the same limitations. The grant of this right of appeal to the United States alone is of itself an exclusion of the claimant from the same right. (U. S. *vs.* More, *supra.*) *Expressio unius est exclusio alterius.*

Again, in the statute of 9th May, 1866, (14 St. at L. 44,) giving a new and additional jurisdiction to the Court of Claims, Congress deemed it necessary to make special provision for an appeal to the Supreme Court, "as in other cases," clearly indicating that it did not deem the provision in the general act to extend to this class of cases..

IV.

The third point raised by the counsel for the petitioner in the Pargoud case, that the question at issue is one which involves the jurisdiction of this court, and which the Court of Claims is not competent to pass upon, is singularly infelicitons.

That the Court of Claims should be compelled by *mandamus* to allow an appeal, and make return to it in a case in which

no appeal is given by law, would seem to involve a manifest absurdity.

The decision of this court in the case of the U. S. *vs.* Adams (6 Wallace, 101) has no application to the question arising here. No pretence is made here of any "discretion" in the Court of Claims to refuse an appeal; but the simple question is whether an appeal is allowed by law. If not, it can hardly be supposed that this court will deem it necessary or proper to require the Court of Claims to send a case here for the mere purpose of enabling this court to decide that it has no business here. And the rules instituted by this court for the regulation of appeals from the Court of Claims are expressly limited to the cases "in which, by the act of Congress, such appeals are allowable." (Rule 1, p. 27, Supreme Court Rules.)

ROB: S. HALE,
Special Counsel of U. S.

In the Supreme Court of the United States.

No. 26 ORIGINAL CASES.

Ex parte BENJAMIN H. ZELNER.

APPLICATION FOR MANDAMUS TO THE JUDGES OF THE COURT OF CLAIMS.

P. L. Schriftgiesser, Printer, 415 3d street west, Washington, D. C.

Brief for the Relator.

The case stated.

The relator, Zelner, says the United States seized thirty bales of his cotton, for which he filed his petition, and made sufficient proof in the Court of Claims.

That the court gave judgment against him, and therein erred.

That he filed his petition in said court for an appeal, which was disallowed, whereby said court erred again.

He asks for a mandamus to the judges of said court to allow said appeal.

This application presents two questions:

IS THE RELATOR ENTITLED TO AN APPEAL?

IS MANDAMUS HIS PROPER REMEDY?

As to the first:

There is a general law allowing either "party to appeal from any final judgment or decree" of the Court of Claims, 5th section, Act March 3, 1863; 12 Stats., p. 765, in force when said judgment was rendered.

The acts which confer jurisdiction of the relator's claim do not exclude it from the scope of the above rule.

12 Stats., p. 820, 3d section; 15 Stats., p. , Act July 27, 1868, section 3.

This would seem to be conclusive in favor of the right.

A glance at the provisions of the statutes conferring jurisdiction, the mode of procedure, and allowing appeals may be useful.

I.—JURISDICTION.

The first section of the Act establishing the Court of Claims, declares:

"And the said court shall hear and determine all claims founded upon

any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either House of Congress."

10, Stats., p. 612.

The second, third, and ninth sections of the Act of March 3, 1863, 12 Stats., p. 765, are as follows:

"That all petitions and bills praying or providing for the satisfaction of private claims against the Goverment, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, shall, unless otherwise ordered by resolution of the House in which the same are presented or introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents to the court aforesaid."

"SEC. 3. That the said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government against any person making claim against the Government in said court; and upon the trial of any such cause it shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for.

"SEC. 9. That the jurisdiction of the said court shall not extend to or include any claim against the Government not pending in said court, on the 1st day of December, A. D. 1862, growing out of, or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

SEC. 13 repeals all former acts.

"An act to provide for the collection of abandoned property," &c., 12 Stats., p. 820, passed March 12, 1863, after providing for the appointment of agents and the collection of abandoned and captured property declares, in the last half of its 3d section, that—

"Any person claiming to have been the owner of any such abandoned or captured property, may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

In connection with the above must be considered a part of the 3d section of the act of July 27, 1868, 15 Stats., p. :

"SEC. 3. That it is hereby declared to have been the true intent and meaning of the act approved March 12, 1863, entitled, 'An Act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States,' that the remedy given in cases of seizure made under said Act, by preferring claim in the Court of Claims, should be exclusive, precluding the owner of any property taken by the agents of the Treasury Department as abandoned or captured property in virtue or under color of said Act from suit at common law, or any other mode of redress whatever, before any court or tribunal other than said Court of Claims." * * * *

"Provided, however, That no judgment, recovered in accordance with this act shall be paid by the United States, unless the amount received by the defendant as the proceeds of the transaction which was the foundation of the suit shall have been paid into the Treasury, except upon an appropriation duly made therefor, after a full examination of the claim upon its merits.

"Approved July 27, 1868."

The Act of July 4, 1864, (13 Stats., p. 381,) excludes jurisdiction, as follows:

"That the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof."

By the Act of June 18, 1866, this was extended to the counties of

Berkley and Jefferson, in West Virginia. Why they were not already within that act is not apparent.

The first section of the Act of May 9, 1866, extends the jurisdiction to another class of cases, (14 Stats., p. 44):

"That the Court of Claims shall have jurisdiction to hear and determine the claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of losses by capture or otherwise while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible: Provided, That an appeal may be taken to the Supreme Court, as in other cases."

While the seventh section of the Act of June 25, 1868, brings in any that may be referred to the court by Heads of Departments. (15 Stats., p.):

"SEC. 7. That it shall and may be lawful for the head of any executive department, whenever any claim is made upon said department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases or furnish a precedent for the future action of any executive department in the adjustment of a class of cases without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the constitution of the United States, to cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant. And the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim of the character, amount, or class described or limited in this section to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said Court of Claims, for trail and adjudiction; *Provided, however*, That no case shall be referred by any head of a department unless it belongs to one of the several classes of cases to which, by reason of the subject matter and character, the said court of claims might under existing laws, take jurisdiction on such voluntary action of the claimant. And all cases mentioned in this section which shall be transmitted by the head of any executive department, or upon the certificate of any Auditor or Comp-

troller, shall be proceeded in as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations; and appeals from the final judgment or decrees of said court therein to the Supreme Court of the United States shall be allowed in the manner now provided by law."

The Court of Claims, then has jurisdiction of—

1. All claims founded on any law of Congress.
2. Arising upon any regulation of an executive department.
3. Arising on contract.
4. Referred by either House of Congress.
5. Of all matters of counter claim or set-off due the United States from any claimant.
6. Of suits by officers for relief against losses incurred by them.
7. Of claims made by owners of abandoned and captured property.
8. Of claims specially referred by the heads of the departments.

The jurisdiction of each of these classes of claims, from whatever source, is unqualified, and precisely that in nature and extent which is conferred over every other.

II.—PROCEDURE

Is by petition verified by affidavit, and, upon issue, sustained by evidence taken under rules applicable to every possible case.

One rule and mode of practice governs every case, without reference to the person by whom, or the thing for which, a suit is brought, or the source from which it may come, 10 Stats., p. 612, section 1; rule 1st of the Court of Claims, 12 Stats., p. 765, section 4.

The judgment is in every case alike, final and conclusive.

It is in no case advisory or ancillary.

These judgments may be reviewed by the Court of Claims on a proper case for new trial made by the United States, 2d section, Act of June 25, 1868, 15 Stats. p. .)

Doubtless the court has the power to grant a new trial to the claimant, on proper showing, although no statute expressly confers it.

III.—APPEAL.

The fifth section of the Act of March 3, 1863, 12 Stats., p. 765, is as follows:

"SEC. 5. That either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said Supreme Court may direct: *Provided*, that such appeal shall be taken within ninety days after the rendition of such judgment or decree: *And provided further*, That when the judgment or decree will effect a class of cases, or furnish a precedent for the future action of any executive department of the Government in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding justice of the Court of Claims, the Supreme Court shall entertain an appeal on behalf of the United States without regard to the amount in controversy."

The eleventh section of the Act is as follows:

"Sec. 11. That any person or persons who shall corruptly practice or attempt to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim, or any part of any claim, against the United States, shall *ipso facto* forfeit the same to the Government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same. Appeals may be taken from the Court of Claims to the Supreme Court in all such cases, on all questions of law, in the manner herein provided for appeals in other cases."

The first section of the Act of March 17, 1866, 14 Stats., p. 9, bearing upon this matter is as follows:

"That the fourteenth section of an act, approved the 3d day of March, A. D. 1863, entitled 'An act to amend an act to establish a court for the investigation of claims against the United States,' approved February 24, 1855, be, and the same is hereby, repealed; and from the final judgment, or decree, in all cases heretofore decided by the Court of Claims, of the character mentioned in the fifth section of said act of March 3d,

1863, an appeal shall be allowed to the Supreme Court of the United States, at any time within ninety days after the passage of this act, except in such cases where the amounts found due by said court have been paid at the Treasury."

The 1st section of the Act of June 26, 1868, 15 Stats., p. , is as follows :

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an appeal to the Supreme Court of the United States shall be allowed on behalf of the United States from all the final judgments of the said Court of Claims adverse to the United States, whether such judgments shall have been rendered by virtue of the general or any special power or jurisdiction of said court under the limitations now provided by law for other cases of appeal from said court."

The seventh section of the above act, and which authorizes any department to refer any case to the Court of Claims, contains this provision :

"And appeals from the final judgments or decrees of said court therein to the Supreme Court of the United States shall be allowed, in the manner now provided by law."

So also the third section of the Act of March 3, 1863, giving jurisdiction of set-offs, &c., allows appeals :

"Such judgment shall be final, with the right of appeal, as in other cases herein provided for."

And so also the first section of the Act of May 9, 1866, extending the jurisdiction of the court to cases of paymasters and others seeking relief from liability for losses, provides :

"That an appeal may be taken to the Supreme Court, as in other cases."—14 Stats., p. 44.

Upon this *resume* of the statutes, what authority can be found for refusing the right of appeal to a claimant for captured property ?

The claim is as meritorious, submitted to the same jurisdiction, tried in the same way, and ends in the same judgment, as are and do all other claims.

If the statute authorizing the relator to bring suit in the Court of Claims does not expressly grant him the right of appeal, it does not deny it, which is equivalent to a grant, because it places his claim unqualifiedly within a jurisdiction from which the general right of appeal was fully provided for, and that right attached at once to his case, as a property and incident.

The first section of the act of June 25, 1868, which in terms gives the pre-existing right of appeal to the United States in all cases, cannot be construed to deny it to claimants. It does not profess to deny it to them, nor does it interfere with any existing right of theirs in this behalf.

It is the first of that extraordinary act in abrogation of common law not to be enlarged by construction.

If thus re-conferring this right upon the Government is construed to withdraw it from the citizen, then in what cases?

In the cases of captured property? Why? Or does it exclude the right in all cases?

Congress doubtless intended, by this language, to remind the Attorney General of the rights of the United States and admonish him of his duty, and had it intended to deprive a citizen of the right to appeal, it would have said so. The rest of that Statute shows the law-maker to have been neither scrupulous or timid.

It is conceded that Congress might in this respect give the United States a right, which it denies to the citizen, but that it has, will not be presumed in the absence of all provision of law on the subject.

Besides, if a case for captured property is referred to the Court of Claims by Congress or the head of a department, it must be conceded that the claimant could appeal, unless all right of appeal is abrogated.

As to the second question:

It can hardly be necessary to offer argument or quote authorities.

It must be conceded that mandamus is the proper remedy.

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For the Relator.